

### **Network Non-Duplication, Syndex**

While MPAA agrees that broadcasters must be accorded their must-carry and retransmission consent rights in the OVS context and that the syndicated exclusivity, network non-duplication, and sports blackout rules must be enforced, there is no basis for granting broadcasters additional protections against discriminatory treatment without according similar protections to non-broadcast programmers. (11)

### **Other**

Issues relating to the application of the cable compulsory license to OVS operation and MVPDs utilizing OVS capacity are best left to Congress, the Copyright Office, and the courts. (12)

## **REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION**

### **Non-Discrimination**

#### **Video Programming Providers**

Regulatory burdens sought by the cable industry and others would effectively violate the intent of the Telecommunications Act, which precludes Title II common carrier regulation of OVS. (3) Instead, the Commission need only codify rules which prevent OVS providers from applying unreasonably discriminatory terms and conditions and rely on the complaint process to review claims of discriminatory treatment in the application of charges. (8) The Commission should adopt the least burdensome OVS regulations consistent with the statute. (3) Only streamlined regulation meets the legislative intent that OVS create an attractive option for video entry. (3)

#### **Channel Capacity and Channel Sharing**

The Commission should adopt its tentative conclusion that OVS operators be permitted to administer the allocation of channel capacity and channel sharing arrangements. (5)

Proposals for detailed rules governing allocation of channel capacity and enrollment periods would preclude possible innovative network configuration and service arrangements. (5) Such proposals would make OVS a burdensome and unattractive video entry alternative. (5)

OVS operators will naturally seek to have their systems fully utilized and will therefore avoid establishing transport prices that would result in idle capacity. (7)

#### **Marketing**

There is no need to bar OVS operators from offering telephone, video, and other services at a single package price; one-stop shopping is a major convenience to consumers. (9)

#### **Separate Subsidiaries**

There is no need and no basis for separate subsidiary restrictions. (8) Congress clearly intended to allow providers to operate open video systems without separate subsidiary or restrictions. (8)

The conferees did not intend the Commission to impose Title II-type regulation on open video systems; separate subsidiary requirements are not permitted. (9)

The interLATA transmissions associated with the video programming services offered by the BOCs are "incidental interLATA services" under Section 271(g)(1)(A). (9) As such, these transmissions would not be subject to the Telecommunications Act's separate affiliate requirements. (9)

## **Title VI Obligations**

### **PEG, Leased Access**

The Commission should reject the efforts of the local municipalities to convert their control over public rights-of-way and the Telecommunications Act's PEG access requirements into a de facto franchise process. (6) The Telecommunications Act explicitly exempts OVS providers from franchise regulation. (6)

OVS providers should be given the flexibility to create and deploy new and innovative approaches to providing access to PEG programming to local communities. (6)

### **Cost Allocation**

Under the Telecommunications Act, the Commission cannot impose Title II or Title II-like rate regulations on OVS. (7) Thus, the Commission has no authority to mandate the filing of rate and cost information as a condition for OVS certification or the submission of tariffs for open video systems. (7-8)

Cost allocation issues should not be allowed to delay implementation of OVS. (9) The Commission should reject suggestions that cost allocation issues related to the delivery of OVS and telephone services by LECs be resolved before LECs may offer OVS. (9) These requests are attempts to forestall competition. (9-10) Requiring cost allocation procedures as part of the certification process is not consistent with the streamlined process mandated by the Telecommunications Act. (10)

### **Other**

The dispute resolution mechanism is the best way to deal with claims of unreasonable discrimination. (4) The 180-day dispute resolution process mandated by the Act will be an effective and nonburdensome check on any risk of discrimination. (4) This dispute resolution process is backed up by the potential for damages or required carriage. (4)

In this regard the OVS complaint process will have more teeth and arguably will be a more effective deterrent to discriminatory conduct than the Commission's program access rules, since complainants that prevail under those rules currently are not entitled to recover damages as a remedy. (4)

## **REPLY COMMENTS OF BELL ATLANTIC, BELLSOUTH, GTE, LINCOLN TELEPHONE, PACIFIC BELL, AND SBC COMMUNICATIONS**

### **Non-Discrimination**

#### **Video Programming Providers**

The Commission must reject the heavy-handed, prospective regulation proposed by cable operators, or there will be no OVS. (iii) The Commission should simply promulgate rules that codify the requirements of Section 653, adopt a streamlined certification process, and then rely on the dispute resolution process to enforce compliance. (iii)

The Commission must also reject all attempts by local governments to impose franchise-like regulation on OVS. (iii) Only rules that enable OVS to be competitively viable and that entail significantly less regulation than cable franchises will encourage LECs and others to deploy OVS. (3)

The Commission must resolve the ambiguity in Section 653(b)(1)(A)'s nondiscrimination requirement in a manner that furthers the pro-competitive purpose of Congress and must avoid any interpretation that makes OVS deployment irrational. (9)

The Commission should not adopt specific rules on the issues of separate treatment of analog and digital channels, but should make it clear that actions reasonably required to enable the system to compete effectively in local markets justify discrimination. (9)

The Commission should evaluate all proposals for OVS rules by a "litmus test": whether the rules will make OVS an attractive option for cable operators. (10) Cable operators will not convert to OVS if they are not permitted sufficient flexibility to maintain their existing analog programming packages -- this flexibility should extend to operators that deploy systems with both analog and digital capacity. (10)

The Act's direction that OVS operators be permitted to deploy systems in a nondiscriminatory and competitively neutral manner necessitates rules that deny local governments a veto power over OVS deployment. (34) In order to carry out the direction of Congress, the Commission must refuse to place a veto power in the hands of local governments. (34)

#### **Channel Capacity**

A transition period would not be reasonable unless it permitted operators to enter into contracts for durations common in the video industry or to make adjustments without violating existing contracts. (14) The parties to these comments recommend that operators be given a reasonable period to make capacity available. (14)

## **Channel Sharing**

The Commission should adopt a rule that invokes the language of Section 653 without elaboration. (12) No carriage arrangements, including channel sharing, may violate copyright laws or contracts governing the distribution of programming.

## **Marketing**

Congress expressly permits operators to market the programming of all providers to subscribers. (6) The Commission must reject the commenters' calls for limitations on inbound and outbound joint marketing. (36) Proposals to restrict OVS operators from making marketing calls that compare their program offerings to those provided by the competing cable company are absurd and may violate the First Amendment. (37)

## **Separate Subsidiaries**

The cable commenters' argument that separate subsidiaries should be required for OVS systems and affiliated video programming providers would impose significant costs that ultimately would be borne by consumers. (22) The 1996 Act makes clear that Congress did not intend for the Commission to require OVS to be provided through a separate subsidiary. (22-23) The Commission should reject arguments for the imposition of a separate subsidiary requirement. (23)

## **Title VI Obligations**

### **PEG, Leased Access**

OVS operators should be encouraged to employ flexible and workable solutions in achieving the Act's PEG requirements. (27)

The Commission should affirm that OVS operators may interconnect with existing PEG feeds to comply with the terms of the 1996 Act. Cable operators and local authorities should not be allowed to prevent or otherwise restrict access to such feeds or condition any interconnection arrangement on compliance with other obligations not expressly imposed by the 1996 Act. (27)

Congress has called for obligations that "to the extent possible" are "no greater or lesser than" the Title VI PEG obligations. (26) OVS operators must not be required to negotiate PEG access with local authorities and incumbent cable operators as a condition for certification. (26)

### **Cost Allocation**

Regarding price, terms, and conditions of carriage, the most effective way to determine whether operators use rates to the disadvantage of other video programming providers is to review rates in response to complaints. (17)

The Commission's existing price cap and cost allocation rules effectively eliminate any risk that telephone companies might cross-subsidize non-common carrier services such as OVS. (20) The Commission should reject claims that additional regulations or safeguards are needed. (21)

There is no need to delay OVS by conducting a cost allocation proceeding first. (21) The correct economic standard for determining cross-subsidy is incremental cost, as the Commission has recognized. (21 n.52).

#### **Other**

The Commission should reject attempts to use rights-of-way as a means of constructing a local approval process that Congress has clearly denied to local governments. (29) The Commission should follow the Act's explicit instructions by promulgating regulations that expedite deployment of OVS with limited local government involvement. (29)

The Act limits local governments to a managerial role over rights-of-way -- this role must be carried out in a nondiscriminatory and competitively neutral manner in exchange for a fair and reasonable fee. (30)

## **REPLY COMMENTS OF THE CITY AND COUNTY OF DENVER, COLORADO**

### **Non-Discrimination**

#### **Video Programming Providers**

Congress is focused on LECs as distinctly "new" entrants in established markets, and the lighter regulatory burdens imposed on OVS are designed to level the playing field with established entertainment and information providers, such as cable operators. (10)

Local governments must have a role in the OVS certification process to ensure that local requirements are met. (11)

### **Title VI Obligations**

#### **PEG, Leased Access**

OVS operators should provide existing and future PEG capacity, facilities, equipment, and operational support that is the same or equivalent to that provided by incumbent cable operators; this will ensure that PEG programmers are able to provide the same quality and diversity of programming to both OVS and cable system subscribers. (5) PEG services should be provided to all subscribers to the OVS system regardless of the other programming that they receive. (8)

## **REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, ("THE COALITION")**

### **Non-Discrimination**

#### **Video Programming Providers**

In regulating this new service, the Commission must ensure that two-thirds of the OVS platform is available for utilization by entities completely unaffiliated with the OVS operator. (3)

The OVS platform must provide meaningful and real access for individuals and organizations not of the OVS operators' preference, both profit and non-profit, that wish to transmit programming on the platform. (3) The platform must provide and guarantee nondiscriminatory access to all parties according to rates, terms, and conditions that are uniform, just and reasonable -- and the OVS platform operator must be able to demonstrate in the certification process that such is the case. (3)

#### **Marketing**

The Commission should prohibit the bundling of services that are not subject to a competitive market. (11) The Commission should establish inbound telemarketing rules that require LECs to disclose all available competitive choices for video programming when customers request telephone service. (11)

Requiring all bundled services to be subject to a competitive market will prevent LECs from using their local exchange monopoly to undercut the competitive market for video services. (12) Because of the LECs' dominant position in their service areas, the Coalition urges the Commission to require them to disclose all competing video programming providers when marketing their own video programming package. (12)

### **Title VI Obligations**

#### **PEG, Leased Access**

PEG access for schools, universities, local governments, non-profit groups, and individuals must be equivalent to access provided by cable operators on cable systems. (5) The right of the public to speak and receive information will be hamstrung if OVS platform operators are required only to provide PEG channel capacity, and not also equipment, services, and facilities under Section 653(c)(1)(B) of the Act. (5)

PEG access helps fulfill the Commission's long-standing interest in promoting localism by providing an open forum for local programming. (7) Section 611 explicitly and unambiguously states that PEG channels are to be administered at the franchise authority level for the purposes of promoting local and community communications. (8)



## **Other**

The Coalition proposes that the Commission 1) establish dispute resolution rules that are in harmony with market-based presumptions, and 2) place the burden of proof on the OVS operator. (10) The same factors that should be used to gauge the reasonableness of an OVS operator's rates can be used to make an initial determination of whether the OVS operator has discriminated against the complainant. (10)

A meaningful alternative dispute resolution mechanism would be consistent with the intent of Congress so long as it occurred during the 180-day period mandated by statute. (10)

## **REPLY COMMENTS OF THE CITY OF SAINT PAUL, MINNESOTA**

### **Non-Discrimination**

#### **Video Programming Providers**

St. Paul supports the four principles presented in the comments of the National League of Cities: 1) the Commission's rules regarding PEG and other Title VI requirements mandated by Congress for OVS must ensure that OVS operators will meet local community needs and interests; 2) the Commission must adopt nondiscrimination provisions that ensure that all programmers will have truly open and affordable access to OVS, and that prevent an OVS from becoming a cable system in disguise; 3) the 1996 Telecommunications Act does not permit cable operators to become OVS operators; and 4) the Commission's rules must acknowledge the property interests that local governments hold in the local public rights-of-way. (2)

### **Title VI Obligations**

#### **PEG, Leased Access**

To fulfill the PEG requirements, the Commission should require OVS operators to match each incumbent cable operator's PEG obligations, or negotiate agreements acceptable to the effected communities. (2)

Local governments are in the best position to deliver on the Act's intent to accomplish PEG access over open video systems. (3) PEG also provides a unique opportunity for multi-cultural communication and expression. (3-4)

**REPLY COMMENTS OF POLITICAL SUBDIVISIONS OF  
THE STATE OF MINNESOTA**

**Non-Discrimination**

**Video Programming Providers**

"The Cities" strongly support the National League of Cities' comments, which argue that: 1) the Commission's rules regarding PEG and other Title VI requirements mandated by Congress for OVS must ensure that OVS operators will meet local community needs and interests; 2) the Commission must adopt nondiscrimination provisions that ensure that all programmers will have truly open and affordable access to OVS, and that prevent an OVS from becoming a cable system in disguise; 3) the 1996 Telecommunications Act does not permit cable operators to become OVS operators; and 4) the Commission's rules must acknowledge the property interests that local governments hold in the local public rights-of-way. (3)

**Title VI Obligations**

**PEG, Leased Access**

The Commission should require OVS operators to negotiate PEG access agreements acceptable to the effected communities. (4) A "match" requirement is a second-best alternative, affording somewhat less flexibility than the "negotiate" scheme. (4)

Widely disparate considerations of the various "Cities" must be addressed at the local level to meet local needs and interests and must be secured by obligations negotiated by local government. (5) The Cities urge the Commission to maintain this local emphasis in adopting OVS rules. (5)

## **REPLY COMMENTS OF THE CITY OF INDIANAPOLIS**

### **Non-Discrimination**

#### **Video Programming Providers**

These comments restate the principles set forth in the Comments of the National League of Cities, which argue that 1) the Commission's rules regarding PEG and other Title VI requirements mandated by Congress for OVS must ensure that OVS operators will meet local community needs and interests; 2) the Commission must adopt nondiscrimination provisions that ensure that all programmers will have truly open and affordable access to OVS, and that prevent an OVS from becoming a cable system in disguise; 3) the 1996 Telecommunications Act does not permit cable operators to become OVS operators; and 4) the Commission's rules must acknowledge the property interests that local governments hold in the local public rights-of-way. (1)

### **Other**

#### **Dispute Resolution**

The City of Indianapolis adds a fifth to the four principles stated by the National League of Cities: all disputes of a local nature should be decided and mediated upon at the local level by an unbiased third party that has experience in resolving disputes, namely that municipality's franchise authority. (2)

## **REPLY COMMENTS OF THE NORTHERN DAKOTA COUNTY CABLE COMMUNICATIONS COMMISSION**

### **Non-Discrimination**

"NDC4" strongly supports the National League of Cities comments and urges the Commission to follow its four principles, which include: 1) the Commission's rules regarding PEG and other Title VI requirements mandated by Congress for OVS must ensure that OVS operators will meet local community needs and interests; 2) the Commission must adopt nondiscrimination provisions that ensure that all programmers will have truly open and affordable access to OVS, and that prevent an OVS from becoming a cable system in disguise; 3) the 1996 Telecommunications Act does not permit cable operators to become OVS operators; and 4) the Commission's rules must acknowledge the property interests that local governments hold in the local public rights-of-way. (1)

### **Title VI Obligations**

#### **PEG, Leased Access**

In determining franchise requirements for PEG programming, channels, production facilities and equipment, capital and operating funds, local franchise authorities have always had the responsibility to balance community needs against their associated costs. (4) The community, with its elected officials, community members, non-profit organizations, institutions, consumers, and businesses, are the appropriate individuals to shape this debate because they are affected locally, understand the needs and interests of the community, and are accountable for the results. (4)

By adopting the National League of Cities' proposal, the Commission will ensure that PEG access counts to serve local needs and interests in local communities and will satisfy the Commission's statutory mandate to impose equivalent obligations on OVS and cable operators. (4)

## **REPLY COMMENTS OF METROPOLITAN DADE COUNTY**

Dade County strongly supports the National League of Cities' comments and urges the Commission to follow its four principles, which include: 1) the Commission's rules regarding PEG and other Title VI requirements mandated by Congress for OVS must ensure that OVS operators will meet local community needs and interests; 2) the Commission must adopt nondiscrimination provisions that ensure that all programmers will have truly open and affordable access to OVS, and that prevent an OVS from becoming a cable system in disguise; 3) the 1996 Telecommunications Act does not permit cable operators to become OVS operators; and 4) the Commission's rules must acknowledge the property interests that local governments hold in the local public rights-of-way. (2)

### **Title VI Obligations**

#### **PEG, Leased Access**

By adopting the National League of Cities' proposal, the Commission will ensure that PEG access continues to serve local needs and interests in Dade County and will satisfy the Commission's statutory mandate to impose equivalent obligations on OVS and cable operators. (3)

## **REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.**

ABC files these comments primarily in response to comments by U S WEST, Inc., which focused on the implementation of retransmission consent. (1)

### **Non-Discrimination**

#### **Retransmission Consent**

Section 325(b)(1) applies the retransmission consent obligation to all MVPDs. (2) The competitive policy of the Telecommunications Act would be defeated if broadcasters were precluded from negotiating separately with competing OVS and cable distributors about the terms and conditions of the carriage of programming. (2)

If broadcasters decide to exercise retransmission consent with respect to both distributors, there should be unrestricted flexibility to negotiate the terms of the retransmission consent contracts. (3) Competition would likewise be enhanced by allowing broadcasters to exercise separate elections for different distributors. (3)

Foreclosing the separate election strategy would constitute government interference in a free market process, which would have the effect of reducing competition. (3)